87-885

NO.

Supreme Court, U.S.
FILED
NOV 2 1987
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

MUMTAZ BANO KHAN,

Appellant

v.

JIMMY R. JENKINS, JOHN H. CARSON, MARION D. THORPE, ELIZABETH CITY STATE UNIVERSITY,

Appellees

SUPPLEMENTAL APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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31pp

IN THE SUPREME COURT OF THE UNITED STATES

October Term, ____

MUMTAZ BANO KHAN, Petitioner,

vs.

JIMMY R. JENKINS, JOHN H. CARSON, MARION D. THORPE, ELIZABETH CITY STATE UNIVERSITY,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 82-39-CIV-2

MUMTAZ BANO KHAN,
Plaintiff

v. ORDER

JIMMY R. JENKINS,
JOHN H. CARSON,
MARION D. THORPE, and
ELIZABETH CITY STATE UNIVERSITY,
Defendants

Plaintiff has filed this law suit under Title VII of the Civil Rights of 1964, 42 U.S.C. 2000-5(e), alleging discriminatory employment practices. On September 16, 1983, plaintiff filed a motion to amend[1] her complaint, pursuant to rule 15 of the Federal Rules of Civil Procedure, to add additional claims for relief and to proceed by class action.

1. The plaintiff has failed to submit supporting memoranda with her motion to amend as required by Local rule 4.03, EDNC. Nevertheless, to avoid further delay, this court will consider the motion.

Rule 15 provides that leave to amend "...shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Courts allow amendments to a complaint liberally, especially when a plaintiff was initially proceeding pro se. The interest of justice, therefore, requires that plaintiff now be allowed to amend her complaint to present her additional claims for relief.

In Count I, paragraph 4, of the amended complaint, plaintiff seeks to bring this action as a class action of all other Asian Americans similarly situated, pursuant to Rule 23(a) (3). Plaintiff's grounds for bringing a class action are conclusory. Also, plaintiff's employment was terminated in May of 1980. Plaintiff filed her complaint on December 30, 1982. The motion to amend was filed on September 16, 1983.

This lapse of time prevents class action status from being in the interest of justice. The requirements of Rule 23(a) and (b) have not been met. For the above reasons this court ORDERS that in respect to class action status relief plaintiff's motion to amend is DENIED. The Plaintiff is ORDERED to file on or before January 16, 1984, her amended complaint absent any class action allegations.

Further, the Defendants' Response to Plaintiff's Motion For Leave to Amend, filed October 14, 1983, raises several defenses to the claims in the amended complaint. This court believes, however, that the defenses would be more appropriately addressed after an answer and upon appropriate motion.

SO ORDERED, this the 6th day of January, 1984.

/S/ Charles K. McCotter, Jr.
CHARLES K. McCOTTER, JR.
United States Magistrate

FILED

JAN 10, 1984

J. RICH LEONARD, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 82-39-CIV-2

MUMTAZ BANO KHAN,
Plaintiff

v.

MEMORANDUM
and
RECOMMENDATION

JIMMY R. JENKINS,
JOHN H. CARSON,
MARION D. THORPE, and
ELIAZBETH CITY STATE UNIVERSITY,
Defendants

Plaintiff has filed this law suit under Title VII of the Civil Rights Act of 1964,, 42 U.S.C. 2000e-5(e) alleging discriminatory employment practices. Defendants' motion for summary judgment is now pending before this court and will be addressed in this memorandum. Plaintiff has also filed a motion to amend her complaint, pursuant to Rule 15 of the Federal Rules of Civil Procedure, which is addressed in a separate order.

First, plaintiff alleges that the

defendants discriminated against her by: terminating her employment; denying tenure; failing to promote; and failing to provide equal salary, all in violation of Title VII. In filing an action under Title VII, the plaintiff must first comply wih administrative filing requirements. At the time of the events alleged herein plaintiff had 180 days from the time of the alleged discriminatory practice in which to file a claim with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. 2000c-5(e). As to all claims not relating to salary, the 180 days began to run when the tenure decision was made and the plaintiff was notified. Delaware State College Et Al v. Ricks, 454 U.S. 6 (1980).

According to the plaintiff, she filed a charge with the EEOC alleging a discriminatory practice in promotion, tenure, and

salary on November 7, 1978, and May 8, 1980. The act immediately prior to November 7, 1978 charge in which plaintiff was notified of a demotion in tenure status was when she signed the previous contract stating the terms of employment. The contract, which plaintiff signed on June 7, 1978, listed plaintiff's teaching status as "lecturer". This status was a lower position in tenure status than that which she previously held. So, plaintiff was notified of that tenure decision as of June 7, 1978. The filing of the EEOC charge on November 7, 1978, was thus timely.

The court must next determine whether the filing of the May 8, 1980, EEOC charges was timely. The 1980 charges repeated the 1978 charges with the addition of a claim of wrongful termination of employment. On August 2, 1979, plaintiff

recieved a letter from defendant Jimmy R. Jenkins, Vice Chancelor of Academic Affairs at Elizabeth City State University. The letter advised the plaintiff that her next contract of employment was a terminal contract and she would not be reappointed for the academic year of 1980-81. Defendants' Exhibit 4. Plaintiff acknowledged receipt of the letter in a letter from her to Dr. Jenkins. Defendants' Exhibit 6. The 180-day filing period began on August 2, 1979, the day upon which plaintiff received notice that employment would terminate.

According to the plaintiff, she filed a charge with the EEOC on May 8, 1980. Thus, plaintiff filed with the EEOC 279 days after August 2, 1979. This filing did not meet the requirements of 42 U.S.C. 2000e-5(e), nor are there equities which would require the tolling of the limita-

tions period. The undersigned magistrate, therefore, finds that the filing of the 1980 EEOC charges, with the exclusion of the equal salary claim, was untimely.

Secondly, the court will determine whether any continuing violations existed. Generally, the action accrues as of the last specific alleged discriminatory act prior to the filing of the charge. Title VII, 42 U.S.C. 2000e-5(e). Yet, plaintiff may demonstrate a continuing violation by showing "...a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the (limitations) period." Valentino v. United States Postal Service, 674 F.2d 56, 65 (D.C. Cir. 1982).

In the case of Jenkins v. Home Insurance Co., 635 F.2d 310 (4th Cir. 1980), the plaintiff was hired by the defendant

as a claims representative in September, 1969. The defendant paid her on a bi-weekly basis. Plaintiff alleged that she was consistently paid less than her male counterparts. The manager told plantiff in the summer of 1976 that the discrepancy was a result of the low salary the company paid her when she was initially hired. The plaintiff's employment ended on December 10, 1977. On May 3, 1978, she filed a claim with the EEOC. Then on December 28, 1978, she filed a lawsuit in federal district court.

The Court of Appeals found a continuing violation under Title VII and the Equal Pay Act, which occurred every two weeks when the plaintiff was paid for the prior work period. The violation continued after her initial hiring because during each pay period her male counterparts were receiving more money for the same

amount of work. The action thus accrued at the end of plaintiff's employment when she was last paid. The court held that the action was timely filed and claims were sufficient to survive the motion for summary judgment. See also, Grove v. Frostburg National Bank, 549 F.Supp. 922 (D.Md. 1982).

In the present case, the undersigned magistrate finds that a continuing violation existed as to the claim of equal pay, but not as to the claims of discrimination in tenure, promotion, and termination of employment. On August 2, 1979, the plaintiff signed her terminal contract. The contract stated that her salary would be paid in nine equal monthly installments, beginning in September, 1979. If plaintiff's allegations are true, then during each pay period a male counterpart doing the same job would be receiving more

money. The court in Jenkins did not base its decision on the presence or absence of hourly wages or contracts. It based its decision, however, on an analogy to racial discrimination saying that although the focus of the discrimination may occur at the time of hiring, discrimination can continue to manifest itself in further acts.

The plaintiff herein received her last salary payment in June of 1980, according to the contract which was signed August 14, 1979. Thus, the alleged discriminatory salary practices continued through June of 1980; however, Ricks, supra, is dispositive of the point that claims based on tenure, promotion and termination are not continuing.

The next question which the defendant has raised is whether the Plaintiff complied with the right-to-sue notice she

received from the U.S. Department of Justice. In a letter dated September 15, 1981, plaintiff acknowledged receipt of a right-to-sue notice from the Justice Department. The letter notified plaintiff that if she wished to file a lawsuit based upon her 1978 and 1980 EEOC charges, she had to file suit within 90 days of the receipt of the notice. The letter emphasized that efforts to obtain a court-appointed attorney should be taken well before the expiration of the 90-day period.

In response to plaintiff's receipt of the right-to-sue notice, she wrote a letter to the Justice Department. This letter, dated September 14, 1981, requested the reasons of the EEOC with regard to its findings and dismissal of plaintiff's case. On October 20, 1981, plaintiff wrote another letter to the Justice De-

partment. The letter stated that she had been unable to find a suitable attorney and she requests an extension of another 90 days. Then, on December 30, 1982, plaintiff filed her complaint. The complaint was thus filed more than one year after the latest possible receipt date of September 15, 1981.

Although, like the 180-day period, the 90-day filing requirement is not a jurisdictional prerequisite, the 90-day requirement is a condition precedent which the defendant has specifically challenged. Plaintiff has failed to show that the letters of September 15, and October 20, 1981, were sufficient to prevent tolling of the 90-day filing period. It was unreasonable for the plaintiff to wait until December 30, 1982, to hear a response to her letters. Because plaintiff failed to meet the 90-day filing requirement, the

court recommends that all Title VII claims be DISMISSED. This court is not recommending dismissal of the entire suit, because the court allowed amendment to the complaint in the Order dated January 6, 1984.

SO RECOMMENDED, this 9th day of January, 1984.

/S/Charles K. McCotter, Jr.

CHARLES K. McCOTTER, JR.

United States Magistrate

FILED

JAN 10, 1984

J. RICH LEONARD, CLERK

U.S. DISTRICT COURT

E. DIST. NO. CAR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 82-39-CIV-2

MUMTAZ BANO KHAN
Plaintiff

v. O R D E R

JIMMY R. JENKINS, JOHN H. CARSON, MARION D. THORPE, and ELIZABETH CITY STATE UNIVERISTY
Defendants

This action is before the Court on the memorandum and recommendation of Magistrate Charles K. McCotter, Jr., filed on 25 January 1984 with regard to the motion of defendants for summary judgment. Plaintiff and defendants have filed objections to the memorandum and recommendation, and the matter is now before the Court for determination. Having fully considered the memorandum and recommendation and the objections thereto, and having conducted an independent review of the record, the

Court concludes that the recommendation of the magistrate are correct and should be adopted by the Court.[1] Accordingly, the Court adopts the magistrate's recommendations as its own; and for the reasons set forth therein, all Title VII claims are dismissed.

This 28 March 1984.

/S/W. Earl Britt
W. EARL BRITT
United States District Judge

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[1] Plaintiff has objected to the finding of the magistrate that a notice of right to sue was issued by the EEOC on or before 15 September 1981. Plaintiff argues that the notice was in fact dated 30 September 1982. After reviewing the record, the Court finds that two notices of right to sue were issued by the EEOC. The first right to sue letter is actually dated 28 August 1981. The second right to sue letter, dated 30 September 1982, is without effect. See Brown v. Mead Corp., 646 F.2d 1163 (6th Cir. 1981); Cleveland v. Douglas Aircraft

FILED

MAR 30, 1984

J.RICH LEONARD, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

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[1] (continued)

Co., 509 F.2d 1027, 1030 (9th Cir. 1975). Furthermore, sufficient equitable grounds to toll the 90-day period do not exist. Harper v. Burgess, 701 F.2d 29, 30 (4th Cir. 1983) (per curian); Stebbins v. Nationwide Mutual Ins. Co., 469 F.2d 268 (4th Cir. 1972), cert. denied, 410 U.S. 939 (1973). All other objections made by plaintiff and defendants are without merit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 82-39-CIV-2

MUMTAZ BANO KHAN
Plaintiff

v.

O R D E R
&
O P I N I O N

JIMMY R. JENKINS et al.,
Defendants

On 30 March 1984, this Court adopted the magistrate's recommendation that all Title VII claims in this matter be dismissed. Pending at that time, but not then ripe for ruling, was plaintiff's amended complaint alleging claims brought pursuant to 42 U.S.C. Secs 1981, 1983, 1985, and 1986 (the federal civil rights enforcement statutes); 42 U.S.C. Sec 2000d (Title VI of the Civil Rights Act of 1964); 29 U.S.C. Sec 206(d) (the Equal Pay Act); 29 U.S.C. Sec 621 (the Age Discrimination in Employment Act of 1967); and 42

U.S.C. Sec 2000e (Title VII of the Civil Rights Act of 1964). Defendants have now moved for summary judgment, Fed. R. Civ. P. 56(c), arguing that these claims are time barred by the relevant statutes of limitations. The Court has reviewed the briefs and has heard oral argument, and the matter is ripe for determination. It should be noted that although plaintiff is at this time without counsel, she was represented by counsel for the purposes of this motion.

First, defendants argue that all claims brought under the civil rights enforcement statutes are time barred. The time limitations for civil rights actions are borrowed from state law. Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975). For instance, an employment discrimination action brought under 42 U.S.C. Sec 1983 is governed by the

three-year limitation established in N.C.G.S. Sec 1-52(2) for actions founded on "a liability created by statute". Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977), cert. denied, 444 U.S. 842 (1979). Plaintiff filed her original complaint on 20 December 1982, over three years after she had signed her final contract with Elizabeth City State University on 14 August 1979. Because plaintiff was notified of her termination on 14 August 1979, Delaware State College v. Ricks, 449 U.S. 250 (1980), all of her claims brought under 42 U.S.C. Secs 1981, 1983, 1985, and 1986 exceed three years and are time barred. Moreover, actions brought under Sec 1986 are governed by a one-year statute of limitations. Martinez v. Winner, 548 F.Supp. 278, 329 n.87 (D. Colo. 1982); Carter v. City of Emporia,

543 F.Supp. 354, 357 (D. Kan. 1982). This one-year limitations period also controls suits brought under Sec 1985 where Sec 1986 is also invoked. Creative Environments, Inc. v. Estabrook, 491 F.Supp. 547, 554 (D. Mass. 1980), aff'd, 680 F.2d 822 (1st Cir. 1981), cert. denied, 103 S.Ct. 345 (1982). Therefore, defendants' motion for summary judgment as to these claims is granted.

Second, plaintiff's Title VI claim must be dismissed for failure to exhaust or to adequately explain the lack of exhaustion of administrative remedies contained in 42 U.S.C. Sec 2000d-1. Therefore, defendants' motion for summary judgment as to this claim is granted.

Third, plaintiff's Title VII claims, 42 U.S.C. Sec 2000e, have been

previously dismissed, see Khanv. Jenkins, No. 82-39-CIV-2 (E.D.N.C. Mar. 30, 1984). The Court will not readdress these issues.

Fourth, defendants contend that plaintiff has never filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) naming any of the defendants. Lawson v. Burlington Industries, Inc., 683 F.2d 862, 863-64 (4th Cir. 1982). In response, plaintiff has produced a letter from an EEOC supervisory trial attorney dated 25 February 1983, which states: "With regard to File No. 018809016, this charge was filed under the Age Discrimination in Employment Act. We are not permitted to disclose such files until we receive from you a written request which cites 'Freedom of Information Act, 5 U.S.C. Sec 552' as the basis for your

request." The letter does not contain the file date, the nature of the charge, or the persons named in it. Without a copy of the charge or further explanation, the Court must grant defendants' motion for summary judgment as to claims brought pursuant to 29 U.S.C. SEC 621.

Last, plaintiff has alleged certain claims under the Equal Pay Act, 29 U.S.C. Sec 206(d). A timely claim brought under the Act must be filed within two years after the cause of action accrued. 29 U.S.C. Sec 255(a). Where willful and intentional conduct is alleged, the suit must be filed within three years. Id. In this case, plaintiff alleges that defendants' conduct was willful and intentional and that she received her last paycheck in June 1980. Therefore, at least one of the Equal Pay claims alleged by plaintiff accrued

within three years of 31 December 1982, the date the complaint was filed. Therefore, defendants' motion for summary judgment is granted as to all Equal Pay claims accruing before 31 December 1979. Because there are genuine issues of material fact in dispute, defendants' motion is denied as to all claims accruing on or after 31 December 1979.

In conclusion, defendants' motion for summary judgment is granted as to all claims brought in the original and amended complaints, except those claims arising on or after 31 December 1979 under the Equal Pay Act. This 24 June 1984.

/S/W. Earl Britt
W. EARL BRITT
United States District Judge

FILED
JUN 26, 1984
J.RICH LEONARD, CLERK
U.S. DISTRICT COURT, E. DIST. NO. CAR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 82-39-CIV-2

MUMTAZ BANO-KHAN,
Plaintiff

v. O R D E R

JIMMMY R. JENKINS, et al.,
Defendants.

Plaintiff and defendants having settled plaintiff's claim under the Equal Pay Act, 29 U.S.C. Sec 206 (d), and the parties having entered a stipulation dismissing said claim with prejudice and all of plaintiff's other claims having previously been dismissed, it is hereby ORDERED that plaintiff have and recover nothing further of defendants and that this action be dismissed. The clerk is directed to enter judgment accordingly.

This 3 December 1985.

/S/W. Earl Britt
W. EARL BRITT
United States District Judge

FILED

DEC 3, 1985

J. RICH LEONARD, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

PROOF OF SERVICE

STATE OF VIRGINIA

City of Newport News to wit:

I, Oldric J. LaBell, Jr., member of the Virginia Bar, and resident of the City of Newport News, Virginia, depose and say that on the 30th day of November, 1987, pursuant to Rule 28.5(c) of the Rules of the U.S. Supreme Court, I served a copy of the foregoing Supplemental Appendix to Petition for a Writ of Certiorari on Jimmy R. Jenkins, John H. Carson, Marion D. Thorpe, Elizabeth City State University, the Respondents herein, by mailing 3 copies thereof, in a duly addressed envelope with first class postage prepaid to Thomas J. Ziko, Associate Attorney General and Lacy H. Thornburg, Attorney General, North Carolina Dept. of Justice, P.O. Box 629, Raleigh, North Carolina, 27602.

Oldric J. LaBell, Jr.

Subscribed and sworn to before me in my City and State aforesaid on this 30th day of November, 1987.

My commission expires: 10/2/90

Notary Public